PUBLIC PROSECUTOR

v.

TENG BOON HOW

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[FT CRIMINAL TRIAL NO. 3 OF 1987]
2 OCTOBER 1990

CRIMINAL PROCEDURE: *Charge sheet and consent to prosecute - Differences as to time and place of arrest - Whether material and substantial differences - Section 39B(3) Dangerous Drugs Act 1952 - Chemist report - Admissibility of - Chemist called as witness - Section 399 Criminal Procedure Code - Exhibits - Marking of - Whether is a requirement.*

The accused T was charged with a trafficking offence under s. 39B of the Dangerous Drugs Act 1952 (the Act). The issues for determination were the admission of the chemist report where the chemist is called as a witness, the differences between the charge sheet and the consent to prosecute (P1) and the failure by PW3 to mark Exhibits P3 and P4 (the newspaper and packet) before handing it over to the chemist for analysis.

Held:

[1] (a) There are two differences between the charge sheet and P1 - one as to time and the other in respect of the place of commission of the offence. Based on the authorities and s. 39B(3) of the Act, P1 does not need to be in writing, if it is given in writing and there are no substantial and material difference from the charge, the consent is valid.

(b) The time difference here was a typographical error (8.30 pagi instead of 8.30 malam); the words in relation to the location of the commission of the offence were not incorrect as it stated the area which T was alleged to have walked along.

[2] (a) The limitation in relation to s. 399 of the Criminal Procedure Code (CPC) as stated in *Lim Chin Yoong v. PP* are not in line with the written law; the provision relating to the attendance of the maker of the report is for the obvious reasons of cross-examination in the event that the report under s. 399 of the CPC is not served on T (as in this case), the maker of such report can be called to testify.

(b) If the maker of such report testifies that he is a maker of a report, the report can be admitted as a piece of evidence since it was made by him and since he has testified to that effect (as on the facts of this case); he is here in person to be cross-examined and as such the report is admitted as part of the evidence in this case.

[3] There are no binding authorities to the effect that the arresting officer should mark exhibits recovered by him; lack of such marking does not mean that there is a break in the chain of evidence if the prosecution can show that the exhibits are not mixed up with others.

[4] Taking into account the defence evidence as a whole, there was no reasonable doubt which was created on a balance of probability to dispel the presumptions of s. 37(d) and (da) of the Act.

[Accused guilty.]

Cases referred to:
PP v. Mohamed Halipah [1982] 1 MLJ 148
PP v. Oie Hee Koi & Associated Appeals [1968] 1 MLJ
Lim Chin Yoong v. PP [1971] 1 MLJ 127

Legislation referred to:
Criminal Procedure Code, s. 399
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), (3)

For the public prosecutor - Hj. Idris bin Haji Osman, DPP
For the accused - W.P. Leong: M/s. W.P. Leong & Partners

JUDGMENT

James Foong JC:

The accused is charged as follows:

> Bahawa kamu pada 20 Januari 1986 jam 8.30 malam di Jalan Sutera 5, Taman Sentosa, di dalam daerah Johor Bahru, di dalam Negeri Johor, telah didapati mengedar satu peket dadah heroin jumlah berat 26.30 gram, dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Merbahaya 1952 (Akta 234) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

The prosecution case is based on the following facts.

That on 20 January 1986 at or about 8p.m. on information received, one Insp. Jasbir Singh (PW3) together with 3 police personnel went to a housing complex called Taman Sentosa in Johore Bahru.

There he positioned his men while he and Con. Zainuddin (PW5) stood near a public phone booth along Jalan Sutera 3. He also parked his car beside him.

At or about 8.20 p.m. Insp. Jasbir Singh and PW5 saw a motor car driven by a male Chinese passing in front of them. The car stopped nearby and parked by the side of Sentosa Shopping Complex.

Insp. Jasbir Singh and PW5 identified the person who drove the car as the accused. The accused got down of the said car, walked along Jalan Sutera 3, passing Insp. Jasbir Singh and PW5 and then proceeded to a lane which this Court termed it as "Lorong yang tidak ada nama," for reason that the sketch plan (P8) does not show the name of this road. Immediately, both Insp. Jasbir Singh and PW5 followed. At the junction of the Lorong yang tidak ada nama and another road by the name of Jalan Sutera 5, the accused looked back. Thereafter the accused started running along Jalan Sutera 5 while Insp. Jasbir Singh and PW5 gave chase.

About 3 to 4 houses along Jalan Sutera 2, PW5 caught up with the accused and by using his leg hooked the accused down on to the road. There was a struggle between PW5 and the accused and when Insp. Jasbir Singh came up to the scene, he assisted PW5 to prevent the accused from running away.

Tucked in the waist of the accused between his trousers, Insp. Jasbir Singh recovered a newspaper wrapping (P5) which when opened was a plastic packet containing substance suspected of dadah (P4). Also found on the accused was a car key and a purse containing RM694.

The accused was then handcuffed and brought to where his car was parked. There a search of his car was carried out and the police party found no incriminating evidence.

The accused was then brought to his residence in Jalan Perang, Taman Pelangi, Johor Bahru in Insp. Jasbir Singh's car. The accused's own car JBL 993 now driven by one of the police party followed behind.

At the accused's residence, the police conducted a search and again found nothing incriminating therein.

At the accused's residence, Insp. Jasbir Singh telephoned one A.S.P. Mohd. Ali (PW7) the investigating officer of this case. PW7 arrived at the accused's residence and then proceeded with Insp. Jasbir Singh to the scene of crime. A sketch plan P8 was then prepared by PW7 Insp. Jasbir Singh then returned to the accused's residence and the police party with the accused then returned to the Johore Bahru police station.

At the police station Insp. Jasbir Singh after completing his police report handed over all exhibits he recovered from the accused to PW7. PW7 immediately marked the exhibits and these exhibits (P3 & P4) which he suspected to contain dadah, were forwarded to the Johor Bahru Chemistry Department for analysis.

The chemist (PW1) testified that he examined and analysed P4 and found it to contain 26.30 grammes nett weight of heroin.

The accused was subsequently charged in Court for this offence.

During the prosecution's case the defence Counsel challenged the prosecution's case on many points and, at this stage I shall deal with them one by one.

The Defence Counsel alleged that the consent to prosecute (P1) differs materially from the charge. As the consent is defective it would affect the charge against accused.

After careful study of the two documents, I noticed that there are only two areas of differences. One in respect of time and the other in respect of the place where the offence was said to have been committed.

P1 uses the word "8.30 pagi" while the charge states "8.30 malam".

P1 uses the words "di simpang Jalan Sutera 2" while the charge states "di Jalan Sutera 5".

The consent to prosecute is a requisite under s. 39B(3) of the Dangerous Drugs Act 1952.

In the case of *PP v. Mohamed Halipah* [1982] 1 MLJ 148 and *PP v. Oei Hee Koi & Associated Appeals* [1968] 1 MLJ the Courts decided that written consent to prosecute is not required if the Deputy Public Prosecutor is present in person to prosecute. The underlining principle for such decisions is that the presence of the Deputy Public Prosecutor implied consent to prosecute being given.

In *PP v. Mohamed Halipah* the Court even ruled no new consent to prosecute need to be given when the charge was subsequently amended and when the Deputy Public Prosecutor was prosecuting.

Section 39B(3) of the Dangerous Drugs Act 1952 does not specify the format and manner it should be given. It never says that such consent need to be in writing.

Under such circumstances I am of the view that if the consent to prosecute is being given in writing and as long as there are no substantial and material differences from the charge, the consent to prosecute is valid.

In this case I find that the consent to prosecute does not contain substantial and material differences from the charge.

The time difference of 8.30 pagi is a typographical error as explained by the learned DPP for which I accept.

Relating to the place of the crime, I find that the words "di simpang Jalan Sutera 3 dan Jalan Sutera 2" must be read with the words "yang dikatakan telah berlaku" which means, is said to have happened. Indeed the incident happened all along the area between Jalan Sutera 2, Jalan Sutera 3, Lorong yang tidak ada nama and Jalan Sutera 5. This is the area which the accused was alleged to have walked along from the place where he parked his car. The consent to prosecute stating the two roads is therefore not incorrect.

Under the aforesaid circumstances, I find that there is no substantial and material difference between the consent to prosecute and the charge itself that would prejudice and affect the accuse in this case.

The second point raised by the defence Counsel relates to the admissibility of the chemist report P6.

PW1, the chemist attended Court and testified that he conducted test on the exhibits forwarded to him by PW7, PW1 also testified orally of the results of his tests. A copy of the chemist's report P6 was then tendered and admitted as evidence.

The defence Counsel quoted me the case of *Lim Chin Yoong v. PP* [1971] 1 MLJ 127 which indicates that reports under s. 399 of the Criminal Procedure Code should not be admitted if the maker is called to testify in Court, it can only be used as a reference while the maker is giving oral testimony.

With our respect to the learned Judge in the case of *Lim Chin Yoong v. PP* I find that such limitations are not in line with the written law.

Section 399 of the Criminal Procedue Code is devised to save the Court's time in proceedings. Reports by persons mentioned in subsection 2 are admissible without the maker being called to testify orally provided that his report has been served on the accused person not less than ten clear days before commencement of trial. However, if the accused person requires the attendance of the maker of the report he must give notice to the Public Prosecutor not less than three clear days before the commencement of trial.

The provision relating to the attendance of the maker of the report is for the obvious reason of cross exmination.

In the event that the report under s. 399 of the Criminal Procedure Code is not being served on the accused (as in this case) or being served less than the stipulated time, the maker of such report can be called to testify.

If the maker of such report attends Court to testify whether the report was served or otherwise s. 399 of the Criminal Procedure Code does not apply anymore.

The maker of the report would first of all under such circumstances has to testify that he is an expert witness. If the report under s. 399 of the Criminal Procedure Code was served and the maker was not called as a witness, this requirement would not have been necessary to prove.

While testifying the maker of the report would be like any other witnesses. If he testifies that he is a maker of a report, that report can be admitted as a piece of evidence since it was made by him and he has testified to that effect.

Under such circumstances I do not see why P6 in this case cannot be admitted as evidence. PW1 the maker of the report testified that he made P6 and he is here in person to be cross-examined.

For the reasons stated aforesaid, I allowed P6 to be admitted as part of the evidence in this case.

The other contention by the defence Counsel is that Insp. Jasbir Singh failed to mark P3 and P4 before he handed them over to PW7.

There are no binding authorities to say that the arresting officer should mark exhibits recovered by him. Marking of exhibits by the arresting officer soon after recovery is to ensure that the exhibits are identified and not being mixed up with others.

However if the exhibits are not marked by the arresting officer it does not mean that there is a break in the chain of evidence if, the prosecution can show that the exhibits are not mixed up with others.

In this case, I find that P3 and P4 were kept by Insp. Jasbir Singh in his possession from the time of recovery to the time when they were handed over to PW7. There is no evidence to indicate that the said exhibits were mixed with other similar exhibits before Insp. Jasbir Singh handed them over to PW7.

At the end of the prosecution case I find that the prosecution has proved a *prima facie* case and I called upon the accused to make this defence.

The defence contention is based on the following.

On 20 January 1986 the accused's brother (DW2) happened to drop in at the accused's house in accused's car. This car JBL 993 was purchased by the accused who testified that he does not possess a driving licence.

DW2 enquired whether the accused would wish to accompany him to Sentosa Shopping Complex to do some shopping. The accused agreed and both of them then proceeded to Sentosa Shopping Complex.

DW2 parked the car JBL 993 at the place where Insp. Jasbir Singh testified where it was parked.

When DW2 and the accused alighted from the car, the accused then revealed for the first time that he wished to visit a friend, indicating a certain direction with his hands.

The brothers' parted and agreed to meet again at a coffee shop in Sentosa Shopping Complex. No time was fixed for this meeting.

The accused testified that he proceeded walking along the route as indicated by Jasbir Singh and PW5. When the accused passed a few houses along Jalan Sutera 5 he noticed a person running out of a house situated on his right side. This person was running towards him and when nearing the accused, this person bent slightly and threw a packet of things underneath a car that was parked nearby.

This person then knocked into the accused's left shoulder causing the accused's body to turn towards the direction where he came from. The accused then fell on to the road, causing tears in his trousers and thereby also injuring himself. Just then, a person whom he identified as Insp. Jasbir Singh arrived and arrested him.

Insp. Jasbir Singh, according to the accused picked up the packet of things from underneath the car, opened it and showed it to the accused.

The accused was then taken by Insp. Jasbir Singh and his men to the accused's residence where Insp. Jasbir Singh found a car key on a table. With this key Insp. Jasbir Singh could have recovered the car JBL 993 from where it was parked near Sentosa Shopping Complex.

The last witness to testify for the defence was one taxi driver DW3. DW3 said that he was at Jalan Sentosa 5 on 20 January 1986 at the time when the incident took place. DW3 stated that he had his head lights on and he happened to be stationary after dropping off a passenger.

DW3 testified that he saw a person running from a house on his right hand side chased by a group of people. The other part of the testimony corroborates almost exactly what was stated by the accused.

DW3 also testified that he saw the accused taken away by Insp. Jasbir Singh in a car which was parked in front of him.

According to the defence the accused remembered that there was a taxi bearing registration No. HJ 941 on that particular day. The accused informed DW2 about this taxi some 3 to 4 days after his arrest. According to DW2 he went all over searching for this taxi and finally found it after 8 to 9 days of search.

What puzzled the Court was why was this information about the existence of a vital witness not told to the police until this hearing?

In answer to question by the Court on this point, the accused replied that he was not asked by the police authorities. Again when pressed further, the accused replied that he refused to give any statement to the police because the officer sent to record his statement informed him that he could either give a statement then or inform the Court of the same during hearing date. The accused of course chose to stay almost 4½ years in jail to tell this Court about the existence of a taxi driver who alleged that he saw everything.

During the testimony of DW3, DW3 said that he can even recognise P3 and P4 as the things picked up by Insp. Jasbir Singh and shown to the accused. He was approximately 10 to 20 feet away. DW3 also said that he recognised the shirts and trousers worn by the accused and the person who was running and knocked into the accused. However, he could not recognise the colour of the car which was parked in front of him which he alleged the accused was taken into by Insp. Jasbir Singh, not forgetting the fact that he had his headlights on shining in the direction of the said car.

The Court questioned the accused as to why he was visiting his friend on that particular day and the name and address of his friend he intended to visit on that particular day.

The accused testified that the name of his friend is one Ah Hwa, who resided in one of the houses along Jalan Sutera 5. His intention of visiting Ah Hwa was to ask Ah Hwa to work for him.

Ah Hwa could not be contacted to testify because DW2 was only told of Ah Hwa some 8 to 9 months after the arrest of the accused. When DW2 attempted to locate Ah Hwa, Ah Hwa "sudah pindah rumah" and cannot be found.

Again why was the existence of Ah Hwa not told to the police authorities earlier. This again could have assited the police authorities to check on the accused's contention and could have even secured his immediate release. However, the accused's reply was that he was not being asked and he preferred to give his version of the events in Court some 4½ years later.

Again, why did not the accused inform DW2 to look for Ah Hwa immediately instead of leaving it to 6 to 9 months later?

The visit to Ah Hwa on the night of the incident was apparently not planned. I find this rather strange as the meeting seems more like a business meeting. The accused was rather casual about such a business meeting as he did not in the first place plan to go. The accused did not even utter a word about visiting Ah Hwa to DW2 while in the car. The accused and DW2 were supposed to go shopping.

In the light of all these circumstances, 'Ah Hwa' seems to be a creation after the event.

The accused denied that he was driving on that particular day. The accused contended that he has no driving licence. Nevertheless the accused purchased a car with an initial outlay of RM8,000 and encumbered upon himself with approximately RM500 per month towards instalment payments under hire purchase. This car he allowed his brother to drive while the car was registered under accused's own name.

Relating to this point I find it strange that DW2 happened to drop by accused's place and asked him to go shopping. DW2 was not even sure whether the accused was around at the material time when he dropped by.

Further, why would DW2 want to go shopping for household items such as tooth paste and toilet tissue or tissue paper when he himself was then working for a fairly large provision shop that had all these items in stock.

Referring back to the incident that took place along Jalan Sutera 5, it is rather strange that the accused did not see anyone chasing the person who knocked into him. The manner that the accused fell was also rather unusual. From the tear of the trousers and the injuries sustained by the accused, it is more in line of DW5 downing him from the rear.

If according to DW3, a party of men were chasing a person running, would it be more probable that one group of men would stop to apprehend the person who has fallen while the rest continue with the case of the person who is still running. Rather, according to DW3 the whole group of people stopped to apprehend the accused.

The time of the incident was approximately 8.30 p.m. in the evening. The defence contended that it was not very dark which I find it hard to believe. Nevertheless, during the commotion (after suffering from a shock of being knocked by a stranger, injured, accused of possessing dadah and arrested), the accused could remember the taxi number clearly.

Taking the defence evidence on the whole I do not find a reasonable doubt being created on a balance of probability to dispel the presumptions of s. 37(d) and (da) of the Danagerous Drugs Act 1952.

I accept the prosecution's version that on particular day, the accused drove the car JBL 993 himself and parked at the spot near Sentosa Shopping Complex. The accused was attempting to carry out a sale of dadah to some person near the place where he parked his car. Being early he proceeded to the public telephone booth to make a call. However, he noticed that he was being watched by Insp. Jasbir Singh and PW5 standing near the telephone booth. He then proceeded alone to the Lorong yang tidak ada nama with the intention of walking round the block to return to his car. When near the entrance of Jalan Sutera, he noticed two other police personnel stationed at the top end of Lorong yang mana tidak ada nama. The accused was then forced to run into Jalan Sutera 5 where he was subsequently arrested with 13 and 14 found on him.

I therefore find the accused guilty of the offence as charged.

Also found at [1990] 2 CLJ 1033